

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1233 of 1998

WITH

CIVIL REVISION APPLICATION NO. 1239 OF 1998,

1240/98, 1242/98 AND 1243/98

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed  
to see the judgements? YES

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2. To be referred to the Reporter or not? YES

3. Whether Their Lordships wish to see the fair copy  
of the judgement? NO

4. Whether this case involves a substantial question  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder? NO

5. Whether it is to be circulated to the Civil Judge?  
NO

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RAJKOT NAGARIK SAHKARI BANK LTD.

Versus

BHAVESH CYCLE STORES

-----  
MR A.D.MITHANI for Petitioner  
NOTICE SERVED for Respondent No. 1  
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CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 30/12/98

ORAL COMMON JUDGEMENT

1. As all these civil revision applications have  
arisen from an identical order passed by the executing

court, Civil Judge [S.D.] - Morvi in the Special Darkhast filed by the petitioners for execution of the decree, these Civil Revision Applications are taken up for hearing together and are being disposed of by this common judgement.

2. The facts of the case are taken from the Civil Revision Application No.1233/98. The petitioner Rajkot Nagrik Sahakari Bank Ltd. is a cooperative bank duly registered under the provisions of the Gujarat Cooperative Societies Act, 1961 [hereinafter referred to as 'the Act, 1961']. It is doing the banking business and the provisions of the Banking Regulations Act are also applicable to its business. The petitioner cooperative bank is doing the banking business to advance various loans and finance assistance to its members who are also its share holders. It is not in dispute that the respondents loanee / loanees is / are its members.

3. The petitioner filed an arbitration suit in the Court of the Board of Registrar's Nominees at Rajkot being Arbitration Suit No.196/92. This suit has been filed for the recovery of the loan amount with interest against the loanee and guarantors. In this arbitration suit, an award has been passed by the Registrar 's Board of Nominees on 17/10/92 and under that award, the petitioner bank is entitled to principal amount of loan with interest. After receipt of the certificate from the Registrar of the Cooperative Societies as provided u/s 103 of the Act, 1961, the petitioner for the execution of the award, a deemed decree filed Special Execution Petition No.29/93 in the Court of the Civil Judge [S.D.] - Morvi. It is the case of the petitioner that in all these cases, except the few cases i.e. of the execution of the award, a deemed decree, the judgement debtors there in have not raised any objections that the executing court has no jurisdiction to execute the award, deemed decree, as the award, deemed decree has not been transferred to it by the Registrar's Board of Nominee. The executing court itself suo motu taken this objection and under the impugned order, it has decided that this deemed decree [award] has been made by the Registrar's Board of Nominees at Rajkot and the same has not been transferred to it and unless it is transferred to it by the Court passing the same, it cannot be executed. Against this order, the bank has filed these Civil Revision Applications.

4. In these civil revision applications, in the civil revision applications in which the counsel have put appearance for the loanees, they have made a statement

that they have no objection in case the court at Morvi proceed with the execution of the award, deemed decree. But as it is a legal question and it may arise in other matters pending or are to be filed by this bank or other cooperative banks in the civil courts, I consider it to be necessary and proper to decide this point in these civil revision applications. The learned counsel for the parties are also in agreement that otherwise also this point has not been decided by this Court so far, so to avoid future litigation on this point, the same may be decided by this Court in these civil revision applications.

5. Learned counsel for the petitioners contended that the learned executing court has totally ignored the relevant provisions of the Act, 1961 and of the Civil Procedure Code and passed the impugned order. The learned executing court has not considered that the Registrar's Board of Nominee exercises its powers not only for one district in respect of Lavad cases but even for more than one district. It is a special remedy provided under the Act, 1961 for adjudication and decision of the disputes between the cooperative societies and its members and to see that these matters are expeditiously disposed of, this special forum has been provided. The distinction is only that the dispute pertain to the recovery of the money is tried as arbitration case, Lavad Suit by the Registrar or its nominees, and ultimate the decision turns out to be an award under which the society has been made entitled for the recovery of the amount mentioned therein. As it has to be recovered by some mode and the legislation has taken care of it and two modes have been provided for its recovery. The one mode is by execution of the award considering the it to be a decree by legal fiction of the civil court and second by the recovery of the said amount as a land revenue. In these cases, I am only concerned with the mode of the recovery of the amount under the award as a decree of the civil court. Carrying this contention further, learned counsel for the petitioner submitted that this is a deemed decree by legal fiction and strict provisions of the CPC cannot be made applicable to the execution thereof. Other wise also, what he contended that in case the provisions of section 39 and order 21 rule 5 and 6 of the CPC are made applicable to this execution applications, then there may be two fold difficulties. Firstly is that very purpose and object of the expeditious disposal of the disputes between the cooperative societies and its members as provided by the Act, 1961 will be frustrated and secondly, recovery of the amount of the award will also

be very difficult. The award has been given by legal fiction, force of a decree of civil court only for the purpose of execution thereof and not for any other purposes. That again in case the view taken by the executing court is upheld by this Court will nothing but only to render this special provision nugatory. Lastly it is contended that the Registrar's Board of Nominee is exercising the powers through out the district and in some of the cases, in more than one districts and in fact, it is not a civil court nor the award otherwise than legal fiction, passed by it a decree under the CPC, he has no power to transfer the same. Similarly, the Registrar also is not a civil court passing the decree which is required to be transferred for execution thereof to the civil courts. Not only this both of these authorities under the Act, 1961, are not the Civil Courts who are trying the civil suits, but by necessary legal fiction these awards have been given force of a decree as if passed by the Civil Court. In support of his contentions, the learned counsel for the petitioners has produced before the court some of the Government notifications issued from time to time under the Act, 1961.

6. Shri B.D.Karia, learned counsel for the respondent assisted the Court for reaching to a correct decision on this important question of law which has arisen for consideration in these civil revision applications.

7. Before proceeding with this judgement further, I consider it necessary to briefly refer the relevant provisions of the Act, 1961 and the Code of Civil Procedure. Section 96 [1] of the Act, 1961 reads -

[1] Notwithstanding anything contained in any other law for the time being in force, any dispute touching the constitution, management or business of a society shall be referred in the prescribed form either by any of the parties to the dispute, or by a federal society to which the society is affiliated, or by a creditor of the society, to the Registrar, if the parties thereto are from amongst the following :-

[a] a society, its committee, any past committee, any past or present officer, any past or present agent, any past or

present servant or nominee, heir or legal representative of any deceased officer, deceased agent or deceased servant of the society, or the Liquidator of the society;

[b] a member, past member or a person claiming through a member, past member or a deceased member of a society, or a society which is a member of the society;

[c] a person, other than a member of the society, who has been granted a loan by the society, or with whom the society has or had transactions under the provisions of section 46, and any person claiming through such a person;

[d] a surety of a member, past member or a deceased member, or a person other than a member who has been granted a loan by the society under section 46, whether such a surety is or is not a member of the society;

[e] any other society, or the Liquidator of such a society.

8. Sub-section [2] thereof lays down that, when any question arises whether for the purposes of sub-section [1] a matter referred to for decision is a dispute or not, the question shall be considered by the Registrar, whose decision shall be final. The section 98 of the Act provides that, if the Registrar is satisfied that any matter referred to him is a dispute, within the meaning of section 96 the Registrar shall, subject to the rules, decide the dispute himself, or refer it for disposal to a nominee, or a board of nominees, appointed by the Registrar. The proviso to section 98 [1] of the Act of 1961 is not relevant for the decision of this Civil Revision Application and therefore, it is not referred to. Sub-section [2] of section 98 of the Act, 1961 is material and relevant and I consider it to make a reference thereto in this judgement. Where any dispute is referred under sub-section [1] for decision to the

Registrar's nominee or board of nominees, the Registrar may at any time, for reasons to be recorded in writing withdraw such dispute from his nominee, or board of nominees, and may decide the dispute himself, or refer it again for decision to any other nominee, or board of nominees, appointed by him. Sub-section [3] again of this section is not relevant and it is not stated herein. Section 99 of the Act, 1961 lays down the procedure to be followed by the Registrar or his nominee or board of nominees for settlement of a dispute and powers of the registrar, his nominee or board of nominees. The Registrar, or his nominee or board of nominee, hearing a dispute u/s 98 shall hear the dispute in the manner prescribed, and shall have power to summon and enforce attendance of witnesses including the parties interested or any of them and to compel them to give evidence, and to compel the production of documents by the same means and as far as possible in the same manner as provided in the case of a Civil Court by the Code of Civil Procedure, 1908. Sub-section [2] of this section reflects some important light on the issue. Only in the cases where a dispute involves complicated question of law or fact, no legal practitioner in his capacity as a legal practitioner or as person holding a power of attorney shall be permitted to appear on behalf of any party at the hearing of a dispute. Section 100 of the Act, 1961 to certain extent analogous to the provision of the CPC as contained in Order 38 thereof. Section 101 of the Act, 1961 provides that, when a dispute is referred to the Registrar for decision, he or his nominee or board of nominees may, after giving a reasonable opportunity to the parties to the dispute to be heard, make an award on the dispute, on the expenses incurred by the parties to the dispute in connection with the proceedings, and the fees and expenses payable to the registrar or his nominee or as the case may be, board of nominees. Such an award shall not be invalid merely on the ground that it was made after the expiry of the period fixed by the Registrar, for deciding the dispute and shall, subject to appeal or review or revision, be binding on the parties to the dispute. Sub-section [2] and [3] of this section are not relevant for the purpose of decision of this case and the same are not being referred to herein. Section 103 of the Act, 1961 is a most crucial and relevant provision and the reference of the same has to made and I consider it to be appropriate to reproduce it in this judgement, which reads as under :

103. Money how recovered - Every order passed  
by the Registrar or a person authorised by him

under section 93 or by the Registrar, his nominee or board of nominees under section 100 or 101, every order, passed in appeal under section 102, every order passed by a Liquidator under section 110, every order passed by the State Government in appeal against orders passed under section 110, and every order passed in revision under section 155, shall, if not carried out -

[a] on a certificate signed by the Registrar or a Liquidator, be deemed to be a decree of a Civil Court, as defined in clause [2] of section 2 of the Code of Civil Procedure, 1908 [V of 1908] and shall, be executed in the same manner as the decree of such court, or

[b] be executed according to the provisions of the Land Revenue Code and the rules thereunder for the time being in force for the recovery of arrears of land revenue:

Provided that, any application for the recovery in such manner of any such sum shall be made to the Collector, and shall be accompanied by a certificate signed by the Registrar, or by any Assistant Registrar to whom the said power has been delegated by the Registrar. Such application shall be made within twelve years from the date fixed in the order and if no such date is fixed, from the date of the order."

9. Now, I may refer the relevant provisions of the Civil Procedure Code, 1908 [hereinafter referred to as 'the Code].

Sub-section [2] of section 2 of the Code defines the decree as follows :

'Decree' means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include -

[a] any adjudication from which an appeal

lies as an appeal from an order, or

[b] any order of dismissal for default.

10. Section 38 of the Code says that a decree may be executed either by the Court which passes it or by the court to which it is sent for execution.

Section - 39 :

[1] The Court which passed a decree may, on the application of the decree holder, send it for execution to another court of competent jurisdiction -

[a] if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other court, or,

[b] if such person has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other court, or,

[c] if the decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of the Court which passed it, or

[d] if the court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other court.

[2] The Court which passed a decree may of its own motion send it for execution to any subordinate court of competent



jurisdiction.

[3] For the purposes of this section, a Court shall be deemed to be a court of competent jurisdiction if, at the time of making the application for the transfer of decree to it, such Court would have jurisdiction to try the suit in which such decree was passed.

12. Notification of Agriculture, Forests & Cooperation Department, Sachivalaya, Gandhinagar dated 17th May 1974 was issued by the Government of Gujarat in exercise of the powers conferred by sub-section [3] of section 3 of the Gujarat Cooperative Societies Act, 1961. In this notification, a reference has been made to section 5 of the Act, 1961. Learned counsel for the petitioner submitted that it is a misprint or error or may be accidental slip in the notification and the reference has been made therein to section 3 of the Act. If we go by the provision of section 5 of the Act, 1961, this order cannot be considered to be or what to say u/s 5 of the Act, 1961. After having a glance to the provision of section 3 of the Act, 1961 and in particular sub-section 3 thereof, there is justification in the explanation furnished by the learned counsel for the petitioner that the order aforesaid was made by the Government of Gujarat in exercise of its purported powers under the said provision. Sub-section [3] of this section empowers the State Government by general or special order to confer on a person or persons appointed under sub-section [2] all or any of the powers of the Registrar under the Act. However, every person appointed under sub-section [2] of section 3 of the Act, 1961 shall work under the general guidance and the superintendence and control of the Registrar.

13. From the order dated 17/5/74, I find that looking to the sizable or substantial quantum of the litigation of this nature, the Government of Gujarat taken cares thereof and permanent board of nominees of the Registrar have been appointed and that too, for more than one district. Under this order, the power of the Registrar were given to the Board of nominees of two members for Rajkot Division, which comprises of the districts Rajkot, Junagadh, Jamnagar, Bhavnagar, Surendranagar, Amreli and Kutch. Order dated 17/5/1974 reads as under :-

Agriculture, Forests & Cooperation Department,

Sachivalaya, Gandhinagar

Dated : 17th May 1974.

:: ORDER ::

Gujarat Cooperative Societies  
Act, 1961 [Gujarat Act of 1962]

No. DDC-1172 Or. No. 227 [4] : - In exercise  
of the powers conferred by sub-section [3] of  
section 5 of the Gujarat Cooperative Societies  
Act, 1961 [Gujarat Act x of 1962], the Government  
of Gujarat hereby confers on persons specified in  
column No.2 of the schedule annexed hereto the  
powers of the Registrar as specified against them  
in column 5 of the said schedule.

:: SCHEDULE ::

Sr.No. Persons Powers

1.	2.	3.
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[1]	Rajkot Divisions	All the powers of the Registrar under section 996 to 101 for Co-op. Societies situated in Rajkot Divisions comprising of Rajkot, Junagadh, Jamnagar, Bhavnagar, Surendranagar, Amreli & Kutch Districts.
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Board of Nominee of  
the Registrar con-  
sisting of the  
following names  
individually.

[1] Shri V.K.Purohit

[2] Shri K.V.Saiyed

By order and in the name of the Governor  
of Gujarat.

sd/-

[J.P.SANGHVI]

Under Secretary

to the Government of Gujarat

Agriculture, Forest and Cooperation

Department

14. The Board of Nominees of the Registrar empowered to exercise all powers of the registrar u/s 96 to 101 of the Act, 1961 for the cooperative societies situated in the Rajkot division.

11. Reference may also be have to the notification dated 30th March 1991 of the Government of Gujarat published in the Government Gazette which reads as under:-

7. [Notification No. GHKH - 24 - 91 / DDC.

1188/5204/J dated 30/3/91, Pub. in Guj. Govt. Gaz. Ext. Pt-IV-B, dated 6/4/91, p. 96[1]. In exercise of the powers conferred by sub-section [3] of section 3 of the Gujarat Cooperative Societies Act, 1961 [Guj. X of 1962] and in supersession of Government Notification, Cooperation Department No. H - 28/84/DDC/7425/G dated 22nd March 1984, the Government of Gujarat hereby confers on the officers specified in column 2 of the Schedule annexed hereto, the powers of Registrar specified against them in column 3 in respect of societies specified in column 5 for the areas specified in column 3 of the said Schedule.

14. The certificate issued in favour of the petitioner u/s 103 of the Act 1961 made by the Assistant District Registrar, Cooperative Societies, Rajkot, reads as under :

"Certificate ::

Pursuant to Award passed by Arbitrator against below mentioned debtors of Shri Rajkot Nagrik Sahakari Bank Ltd., Rajkot Taluka, Rajkot, Dist. Rajkot, in Lavad Case No. 296/94 for recovering :

Rs. 16,669/- principal outstanding dues

Rs. \_\_\_\_\_ Expenditure of members

Rs. 455/- Costs of registrar's nominee - board of  
of nominee

Rs. \_\_\_\_\_ Amount of interest upto date of decree

Total Rs. 17,149/-

With interest at the rate of 14.5 % on principal  
amount of Rs.,16,604/- till realisation.

Name of defendants

1. Bhavesh Cycle Stores
2. Jagjivan Bechardas

This is to certify pursuant to section 103 of the Gujarat Cooperative Societies Act, 1961 [10 of 1962] that amount of award enclosed herewith is not recovered and it is hereby ordered to get executed the said award by Civil Court.

sd/- Asstt. District Registrar  
Cooperative Societies, Rajkot"

15. In view of the notification of the Government of Gujarat dated 30th March 1991 published in the Government Gazette on 6/4/1991, this certificate issued by the Assistant District Registrar, Rajkot shall be taken to have been issued by the Registrar under the aforesaid provision.

16. It is not in dispute between the parties that the loan has been given to the judgement debtor by the branch of the petitioner bank at Morvi for business or trade. It is also not in dispute that the property both of moveable and immoveable of the debtor / defaulter, to the best of knowledge of the petitioner, are there at Morvi.

17. If we go by the provision of the CPC, then this deemed decree by legal fiction is executable by a court which passes a decree or by the court to which it is sent for execution. The controversy centres in this case on the question that this decree is passed or deemed to have been passed by the board of nominees of Registrar at Rajkot and though under the Act, 1961, he may not have powers to execute the same, but in case the petitioners

desirous of executing the same at Morvi, it has to be transferred to that court for execution by the Registrar or an officer to which the powers of the Registrar have been delegated by the Government of Gujarat.

18. Learned counsel for the parties are not at variance that the award passed by the board of nominees of the registrar is not a decree of a civil court, but by virtue of provision of section 103 of the Act, 1961, by legal fiction, it shall be deemed to have been a decree of the civil court. Otherwise also, there cannot be any dispute on this point.

19. Therefore, I am in agreement with the learned counsel for the parties that the award passed by the board of nominees of the registrar is not a decree of the civil court, but it shall be deemed to have been a decree of the civil court only for the limited purpose of execution thereof.

20. Under section 103 of the Act, 1961, two mode of recovery of the amount awarded in favour of the petitioners by the board of nominees of the Registrar in a Lavad case, have been provided. The first mode is of the execution of award as a deemed decree of the civil court by the civil court. So far as the second mode is concerned, though it is not relevant for the purpose of deciding the controversy arises in this case, but I consider it to be appropriate to make a reference thereof as a land revenue. It is not in dispute between the learned counsel for the parties that Morvi is a taluka of revenue as well as judicial district of Rajkot. As stated earlier, from the order dated 17th May 1974, the board of nominees of the Registrar have all the powers of the Registrar u/s 96 to 101 of the Act, 1961 for the cooperative societies situated in Rajkot Division, which includes the Rajkot revenue district.

21. In case the board of nominees of the Registrar would have powers either under the special Act, 1961 or under the CPC to execute its award as a decree, there may be some justification in the contention of the learned counsel for the defaulters, but it is not legal position as well as a dispute on facts also that the board of nominees of registrar has no such powers.

22. Learned counsel for the petitioners has not given assistance to the court to the extent to which it was expected on the question as to what extent the provision of CPC are applicable to the matters to be decided under the Act, 1961. In these matters from opposite side, it

is submitted that the CPC is not applicable as a whole to the matters to be decided under the Act, 1961 by the board of nominees and in his submission, provision of the Code are applicable to the extent it is made applicable in a given provision of the special act. This contention of Shri Karia appears to be reasonable and to a certain extent, acceptable also. Learned counsel for the petitioners is also unable to submit something substantial contrary to what Mr. Karia, learned counsel for the defaulter contended.

23. From the order of the learned executing court impugned in these Civil Revision Applications, I find that the court has taken in substantial cases suo motu objection that the award passed by Board of nominee of Registrar, Rajkot has not been transferred for its execution to this court under the provision of order 39 read with order 21 rule 6 of the CPC. The direction has been given for taking the orders of transfer of that award in accordance with the provision of the Code and in case that order is not obtained, then the consequence thereof has also been given.

24. The award passed by the board of nominees of the Registrar is not a decree and as such, it may not be executable by the civil court. It is by legal fiction as stated earlier became an executable decree by the civil court. The Board of nominees of the Registrar is only conferred with the powers to pass an award in the arbitration case. This award for the purpose of execution has been given by the legal fiction a character of decree executable by the civil court on a certificate to be issued by the Registrar or an officer to whom the powers of Registrar have been conferred u/s 103 of the Act, 1961.

25. Section 39 of the Code provides that the court which passes a decree may on the application of the decree holder send it for execution to another court of competent jurisdiction. Section 38 of the Code clearly lays down that a decree may be executed either by the court it passes or by the court to which is sent for execution. So, if we read these two provisions of the Code co-jointly, the court which passes the decree has to execute the same and in the circumstances, as provided u/s 39 of the Code, it may be transfer on the application of the decree holder for its execution to another court of competent jurisdiction.

26. The certificate issued u/s 103 of the Act, 1961

by the officer concerned by legal fiction be taken to be an executable decree by the Civil Court, when it is presented in the court. In this case, executing court is situated within the revenue and / or judicial district of Rajkot in which district also the board of nominees is there and it has to be executed by that court. It is not a requirement of the law either under the provision of the Special Act, 1961 or the CPC that it has to be transferred by the board of nominees or the Registrar to the civil court. The Board of nominees has no power whatsoever to grant a certificate u/s 103 of the Act, 1961. Only on grant of this certificate u/s 103 of the Act, 1961, the award of the Board of nominees of the Registrar becomes a decree as defined in clause [2] of section 2 of the CPC. It is not out of the contest to state here that the Registrar is also not the court which passes the decree, and for the purpose of execution of the award of Board of nomination of the Registrar, this certificate is issued by the Registrar u/s 103 of the Act, 1961. The moment this certificate is issued, it becomes a decree as defined in clause 2 of section 2 of the CPC and it becomes an executable decree by the civil court. It is understandable that where the Board of nominees of the Registrar has powers to execute the decree, then there may be some semblance of justification in the contention of the learned counsel for the defaulter that unless it is transferred to the civil court for execution at Morvi, then only it could have proceeded with the execution and not otherwise. Similarly, where the decree would have been executable by the Registrar, then there would have been some justification in this contention, but in both these cases, when admittedly, as well as from the scheme of the Special Act, 1961, it is not an executable by those authorities, the provision of section 39 or order 21 rule 6 CPC cannot be put into service by the defaulters in this case or it could have taken an objection suo motu by the executing court.

27. Order 21 Rule 5 of the CPC is in fact makes a procedure for the transfer of the decree from one court to another court for execution thereof. But the substantive provision on the subject contained in section 39 of the Code. An harmonious construction of the provisions of the Act, 1961 and the Code of Civil Procedure is to be made. In case the interpretation which has been given to the provisions of section 39 and order 21 rule 5 & 6 of the Code and the Act, 1961 by the learned trial court is accepted, then the defaulter can make it very easy not to pay single pie to the Bank and a legal fiction to the award made by the Board of Nominees

of the Registrar is given by the Legislator by enacting section 103 of the Act, 1961 will become nugatory or the very object and purpose of this provision shall be frustrated. The mode provided by the legislature for the execution of the award passed by the Board of Nominees of the Registrar by the Civil Court will to have no force and the cooperative societies will left with only one mode of the execution thereof as laid down in clause [b] of section 103 of the Act, 1961.

28. The provision contained in order 21 of the Code for the execution of the decrees of the Civil Court are to be taken as applicable in the matter of the execution of the award, deemed decree passed by the Board of Nominees of the Registrar. Similarly, order 39 of the CPC is also to be taken to be applicable to the extent where it is necessary to the execution of the award, deemed decree of the Board of Nominees of the Registrar. There may be a case where the deemed decree i.e. the award of Board of Nominees of the Registrar has been filed for execution in a civil court, but because the properties of the defaulter are not situated or defaulter himself may not be residing within the territorial jurisdiction of the Court, in that case, an occasion may arise or it becomes necessary for the transfer of the deemed decree to some other civil court for its execution. So once a certificate which bears a force of a decree of the Civil Court by legal fiction as given u/s 103 of the Act, 1961 is filed for execution in a civil court of competent jurisdiction that court has to proceed with the same as if it is an execution application for execution of a decree passed by it and if necessity arises, may in exercise of its powers u/s 39 read with order 21 rule 5 and 6 of the Code, it may transfer the decree to some other civil court for execution. That is only a reasonable, plausible and harmonious construction of the provisions of the Act, 1961 and the Code and in case this interpretation is given, then the deemed decrees by legal fiction of the awards passed by the Board of Nominees of the Registrar can only be executed by the civil court and not otherwise.

29. Learned executing court has totally lost sight of this important aspect of this matter and its whole approach is contrary to the relevant provisions of Act, 1961 read with section 39 and order 21 rule 5 and 6 of the CPC. More so, the defaulters have not raised any objection in most of the cases regarding execution of the deemed decree by the court.

30. In the case of Merla Ramanna vs. Nallaparaju and



others AIR 1956 SC 87 their Lordships of the Supreme Court while dealing with the provisions of sections 37, 38 and 39 of the Code of Civil Procedure, has held as under :

"12. The next question for consideration is whether the present suit was filed in a Court which had jurisdiction to execute the decree in O.S. No.25 of 1927. That was a decree passed by the Subordinate Judge of Kakinada, whereas the present suit was filed in the District Court, East Godavari to which the Court of the Subordinate Judge of Kakinada is subordinate. Section 38, Civil Procedure Code provides that a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution.

The District Court of East Godavari is neither the Court which passed the decree in O.S. No.25 of 1927 nor the Court to which it had been sent for execution. But it is common ground that when the present suit was instituted in the District Court, East Godavari, it had jurisdiction over the properties, which are the subject matter of this suit. It is true that by itself this is not sufficient to make the District Court of East Godavari the Court which passed the decree for purpose of section 38, because under section 37, it is only ceased to have jurisdiction to execute it that the court which has jurisdiction over the subject matter when the execution application is presented can be considered as the court which passed the decree.

And it is settled law that the Court which actually passed the decree does not lose its jurisdiction to execute it, by reason of the subject matter thereof being transferred subsequently to the jurisdiction of another court. Vide 'Seeni Nadan vs. Muthuswamy Pillai' AIR 1920 MAD 427 [FB] [P] - 'Masrab Khan vs. Debnath Mali', AIR 1925 BOM 414 [R]. But does it follow from this that the District Court, East Godavari has no jurisdiction to entertain the execution

application in respect of the decree in O.S. No. 25 of 1927 passed by the court of the subordinate Judge, Kakinada?

13. There is a long course of decisions in the High Court of Calcutta that when jurisdiction over the subject matter of a decree is transferred to another court, that court is also competent to entertain an application for execution of the decree. Vide *Latchman vs. Maddan Mohun*, 6 Cal 238 [T] and *Udit Narain vs. Mathura Prasad*, 35 Cal 974 [U]; But in *'Ramier vs. Muthukrishna Ayyar*, AIR 1932 Mad 418 [FB] [V], a Full Bench of the Madras High Court has taken a different view, and held that in the absence of an order of transfer by the court which passed the decree, that court alone can entertain an application for execution and not the court to whose jurisdiction the subject matter has been transferred.

This view is supported by the decision in AIR 1942 Cal 321 [Q]. It is not necessary in this case to decide which of these two views is correct, because even assuming that the opinion expressed in *'Ramier vs. Muthukrishna Ayyar*', AIR 1932 Mad 418 [FB] [V] is correct, the present case is governed by the principle laid down in - *'Balakrishnayya vs. Linga Rao*', AIR 1949 Mad 449 [W].

It was held therein that the court to whose jurisdiction the subject matter of the decree is transferred acquires inherent jurisdiction over the same by reason of such transfer, and that if it entertains an execution application with reference thereto, it would be at the worst be an irregular assumption of jurisdiction and not a total absence of it, and if objection to it is not taken at the earliest opportunity, it must be deemed to have been waived, and cannot be raised at any later stage of the proceedings.

That precisely is the position here. We have held that the allegations in the plaint do raise the question of excessive execution, and it was therefore open to the appellant to have raised the plea that the suit was barred by s. 47 and then, there could have been no question of waiver. We have, it is true, permitted the

appellant to raise the contention that the present suit is barred by s. 47 and one of the reasons, therefore, is that the allegations in the plaint are so vague that the appellant might have missed their true import. But that is not a sufficient ground for relieving him from the consequence which must follow on his failure to raise the objection in his written statement.

We agree with the decision in AIR 1943

Mad 449 [W], and hold that the objection to the District Court entertaining an application to execute in O.S. No. 25 of 1927 is one that could be waived and not having been taken in the written statement is not now available to the appellant. There is thus no legal bar to our treating the plaint presented by the respondents on 7/8/1939 as an execution application under s. 47, and in the interests of justice, we direct it to be so treated. But this should be on terms.

We cannot ignore the fact that it is the

gross negligence of the respondents at all stages that has been responsible for all the troubles. They did not appear in the suit and put forward their rights under Ex. A. They intervened at the stage of execution, but their complaint was mainly that the exparte decree had been obtained by fraud, a plea which has now been negatived.

Even in this suit, they did not press the

plea on which they have succeeded until they came to the High Court. Under the circumstances, we think it just that they should be deprived of all claims for mesne profits down to this date."

31. This important aspects is to be considered in this matter Merely filing of a decree for execution in a court even if it has no jurisdiction to execute the same, is not a matter relating to the jurisdiction, but at the most, it may be an irregularity and only on this ground, otherwise also, the proceedings before it of the executing decree will not be termed as a nullity. It is not in dispute that the respondent - defaulter, has taken loan from the branch of the petitioner Bank at Morbi for his business or trade and he is residing there and further, he is holding both moveable and immoveable properties there. Other wise also, now when we talk

about social justice or substantial justice or justice oriented approach, this approach of the executing court is wholly perverse. The objection raised by the party to the proceedings or by court suo motu has to be considered in the context of the provision of the Act concerned, where any prejudice is caused or the proceedings if continues results in failure of justice to the party concerned, then only, it may have some substance. But in case where the objection has been raised by the party with the motive or purpose of delaying the execution of decree, then the court should have last to accept the same. The courts should have taken note of the well known tendency of the litigant herein judgement debtor, in the country to delay to all the possible extent the execution of the decree. In this matters, the well known say of the Privy Council in 1930's appears to be correct that the real trouble of the decree holder starts in the country when he put the decree in execution. Here, unfortunately, the defaulter has not raised such objection, but the court has suo motu in substantial cases raised this objection.

32. Considering the matter from any angle, the order of the court below cannot be allowed to stand. This is a case where the award which has been passed by the Board of Nominees of the Registrar way back in the year 1992 has sufficiently been delayed. The substance of the matter has to be considered and if it is considered in that context, I have no hesitation to say that the executing court was not correct in its approach to raise any such technical objection suo motu, more so when if we go deep in the matter, it will not cause any injury and failure of justice to the judgement debtor also in the facts of the case.

33. Taking into consideration the totality of the facts and circumstances of the case and as a result of discussion made above, all these civil revision applications deserve to be allowed and accordingly, the same are allowed. The impugned order of the court below is quashed and set aside. The court below is directed to proceed with the execution of the deemed decree and all endeavor should be made by it to see that the execution there of is not delayed. Learned counsel for the defaulters in some of revision applications have very fairly come before this Court, I do not consider it to be a fit case where any costs has to be awarded to the petitioners.

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